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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 188

SCHERER & SONS, INC., a Florida corporation
Petitioner

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL No. 415, AFL-CIO, and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF UNION IN OPPOSITION

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Opinions Below

The opinion of the court below (App. 1)* is reported in 341 F. 2d 298. The findings of fact, con-

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* References to the Appendix annexed to the Petition are cited "App. ", while references to the Record are cited "R. ".

clusions of law, and judgment of the district court (R. 557-564) are not officially reported.

Jurisdiction

The judgment of the court below was entered on February 15, 1965 (App. 2). A petition for rehearing was denied on March 19, 1965 (App. 3). The petition for a writ of certiorari was filed on May 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

Whether a provision in an apparel industry collective bargaining agreement forbidding non-union subcontracting, desired by the union and opposed by the employers, and secured by the union over the employers' objections in order to protect the wages, standards and job security of the workers the union represents, violates the antitrust laws.

Statutes Involved

The statutory provisions involved are the Sherman Act, 15 U.S.C. § 1 *et seq.* (1958 ed.); Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52 (1958 ed.); the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1958 ed.); and Section 8 (e) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 158 (e) (1958 ed.).

Statement

The district court's findings of fact (R. 557-563), sustained by the court below (App. 1, 3), and virtually unchallenged by the Petition,[1] show the following:

In 1957, Local 415 of the International Ladies' Garment Workers' Union, AFL-CIO (the Union), entered into a traditional three-year collective bargaining agreement with the Florida Apparel Manufacturers' Association (R. 559). The Association then contained about 30 members who manufactured ladies' apparel in the Miami area (R. 559).

The 1957 agreement contained among other things limitations on subcontracting by Association members, requiring that such subcontracted work be made in union shops (R. 559-560).

In 1960, when the agreement was about to expire, the Union presented some 17 demands to the Association (R. 79, 560, Def. Ex. 3). The list covered improvements in wages and other standards. Included in this list was Item #12 which stated (R. 260):

> "All accessories, including but not limited to, belts, buttons, and embroidery to be made under Union conditions".

This item is the precursor of Paragraph 6 of the Supplemental Agreement, hereinafter mentioned, which gave rise to the instant case.

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[1] The Petition does assert that the findings "are clearly erroneous" (Pet. 12), but makes no effort to document this naked and wholly inaccurate *ipse dixit*.

The Association members vigorously resisted the demands of the Union on the ground that their labor costs were already much higher than those of their non-union competitors in the Miami area (R. 561). These non-union firms outnumbered the Association shops more than five to one (R. 11-12, 121-122).[2]

Among the Union demands to which the Association members strongly objected was Item #12 (R. 80-81) but the Union "insisted and absolutely demanded that this be met * * * [and] would not negotiate on any other terms unless first this comes to a complete understanding" (R. 81).

The reason for the Union's strong desire to insert a clause like this in the new contract was, as stated by the Union's principal negotiator, "to protect the standards and conditions of our members in the Miami market" (R. 265). During the first contract, from 1957 to 1960, disagreements had arisen concerning the proper scope of the limitations on subcontracting contained in that agreement (R. 560). To make clear that these limitations also pertained to accessories, belts and the like, the Union's negotiator proposed and insisted on Item #12 (R. 560).

The Association after lengthy negotiations finally capitulated and agreed to the inclusion in the renewal agreement of the Union's demand regarding this matter. The final clause was drafted by the Union (R. 262-263, 562) and became Paragraph 6 of the

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[2] The number of Association firms had dwindled to about 17 or 20 (R. 12, 122). There were between 100 and 200 non-union shops (*ibid.*).

Supplemental Agreement dated October 25, 1960, reading as follows (R. 336, 561-562):

> "6. Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments, etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the Union, the International or affiliates thereof. In case a member of the Association shall have this work done by a non-union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-union shop or shops."

Petitioner is a non-union manufacturer of belts, buttons and accessories (R. 558). After the Supplemental Agreement took effect, some Association members nevertheless continued to subcontract belt and accessory work to petitioner (R. 562). The Union thereupon threatened to invoke the agreement against such members if they continued this practice (R. 245-247, 562). This effort of the Union to secure compliance with the agreement was countered by a suit in the Florida state courts initiated by petitioner under the state antitrust statutes, Florida Statutes, Section 542.05 (R. 214). Petitioner secured an injunction against the attempted enforcement of Paragraph 6 which remained in effect until it was vacated by the Florida Supreme Court in September 1962, 142 So. 2d 290.[3]

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[3] The court held that the subject matter of the suit under the state antitrust statute was preempted by the National Labor Relations Act. It remanded the case to the lower court, however, to determine whether relief should be granted under the Florida

Thereupon the Union in October 1962 again attempted to enforce Paragraph 6 (R. 214, 562). This time petitioner started the instant antitrust suit in the federal district court on October 22, 1962 (R. 291).

The cause proceeded to trial before the court sitting without a jury on the single issue, *viz.* (R. 409):

> "* * * whether the Local Union, by entering into Paragraph 6 of the Supplemental Agreement of October 26, 1960, or by other acts and conduct, aided and abetted the members of the Defendant, Florida Apparel Manufacturers Association, Inc., in the latter's alleged conspiracy to stifle competition and restrain trade in the manufacture, sale, use or consumption of merchandise."

After trial, the court on March 2, 1964, entered its findings of fact and conclusions of law as aforestated (R. 557-563). In addition to the findings already set forth, it found that the employer members of the Association never sought to enforce Paragraph 6; and that Paragraph 6 did not effect either price fixing, the elimination of competition, or other results prohibited by the Sherman Act (R. 563). The court concluded

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right-to-work amendment. After certain intermediate proceedings (see 163 So. 2d 306), the lower state court recently again enjoined enforcement of Paragraph 6 on the basis of the right-to-work amendment (App. 7-14). The Union has appealed from this decision.

Petitioner also filed unfair labor practice charges against the Union before the National Labor Relations Board, based on the execution and attempted enforcement of Paragraph 6. The charges were dismissed by the NLRB Regional Office, and affirmed on appeal to the NLRB General Counsel, on the ground that Section 8(e) of the National Labor Relations Act expressly authorizes the challenged provision. See the relevant papers made part of petitioner's reply brief in the court below and certified to this Court at petitioner's instance (Pet. 2).

that petitioner had not shown that the purpose or result of Paragraph 6 or of other acts or conduct of the defendants constituted an unlawful restraint of commerce within the antitrust laws; and it thereupon dismissed the complaint (R. 563-564).

The court below affirmed the judgment on February 15, 1965 (App. 2), and denied rehearing on March 19, 1965 (App. 3).

ARGUMENT

1. Thrashing about to strike down Paragraph 6, a traditional and lawful apparel industry contractual provision forbidding non-union subcontracting, petitioner has resorted as shown (*supra,* pp. 5, 6 and fn. 3) to a state court antitrust suit, a state court right-to-work suit, Labor Board unfair labor practice charges, and the instant suit under the Sherman Act. The courts below have rejected petitioner's Sherman Act claim as void of merit and there are no grounds warranting review.

As found by the trial court, Paragraph 6 was devised, insisted upon and obtained by the Union in its self-interest over the strong objections of the employers. It serves only Union ends, *viz.,* protection of the wages, standards and job security of the Union workers against displacement by workers operating under substandard non-union conditions. The Association employers would dearly love to be able to subcontract to lower-standard non-union shops, and as the trial court found (R. 563) at no time have the employers

sought to enforce Paragraph 6. It is only the Union which has attempted to do so.

In short, we have here a classic instance of the kind referred to in *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504 (1940)—that union activity to be successful "must eliminate the competition from non-union made goods."

It is no surprise that petitioner has ignored *Apex* here and in its principal brief below. For in light of *Apex,* petitioner's effort to base an antitrust complaint on the Union's success in achieving and invoking a restriction on non-union production by Union firms approaches the fantastic.

Nor is there the slightest basis for petitioner's claim of conflict (Pet. 22) with *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1940) and *U.S.* v. *Women's Sportswear Mfrs. Assn.,* 336 U.S. 460 (1949). In *Allen Bradley,* unlike the case at bar, a union aided a conspiracy of business men to achieve *their* unlawful objectives of price and market control. The Court assumed that the collective agreement "standing alone would not have violated the Sherman Act" (p. 809). And *Women's Sportswear* likewise involved a conspiracy by business men "to restrict competition and to control prices and markets" (p. 463). There was no union participation whatever. The Court pointed out that the business men had belatedly incorporated so-called labor provisions as a blind or facade which "seem to give nothing to labor that it was not already getting for itself" from its existing collective bargaining agreements (p. 464). The clear implication is that these collective agreements containing contracting-out

restrictions which the union had "already [gotten] for itself" and which did "give [something] to labor" were lawful.

In sum, there is no semblance of conflict with either decision.

2. If there could otherwise be any doubt that the case at bar was correctly decided, it is dispelled by Section 8(e) of the National Labor Relations Act added in 1959. As petitioner appears to recognize (Pet. 8, 17-18, 20, 23), this section explicitly authoriezs and legalizes a provision like Paragraph 6 in the Apparel and Clothing Industry. And when Congress has expressly declared such a provision to be in accord with national labor policy, and necessary to protect wages, hours and working conditions in this notoriously sweatshop industry, it certainly cannot be deemed to violate the Sherman Act. *Meat Cutters Union* v. *Jewel Tea Co.*, U.S. (1965); see also *Timken Roller Bearing Co.*, 70 NLRB 500, 518 (1946) (restrictions on subcontracting a mandatory subject of collective bargaining), reversed on other grounds, 161 F. 2d 949 (C.A. 6, 1949), cited with approval in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959), and in *Jewel Tea, supra; United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Petitioner asserts that Section 8(e) is unconstitutional (Pet. 8, 17-18, 20-22, 23) but offers no reason or support for this claim. The three circuits which have had occasion to consider the issue have all held Section 8(e) to be constitutional, *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20

(C.A. 5, 1962); *NLRB* v. *Amalgamated Lithographers of America,* 309 F. 2d 31 (C.A. 9, 1962), cert. den. 372 U.S. 943 (1963); *Truck Drivers Local No. 413* v. *NLRB,* 334 F. 2d 539 (C.A.D.C. 1964), and there are no contrary decisions.

CONCLUSION

The decision below is correct. It presents neither a conflict of decision, nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondents.

REPLY TO THE "BRIEF OF UNION IN OPPOSITION"

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SUPPLEMENTAL ARGUMENT

The petitioner, SCHERER & SONS, INC., in accordance with the provisions of Rule 24(4), files this, its Reply to The "Brief Of Union In Opposition" to the Petition for Writ of Certiorari, and says:

The Union, in its brief, not only sloughs off/over the matters and things set out in the Petition for Writ of Certiorari, but, completely ignores the accusation, in addition to the many other indictments contained in the Petition, including, but not limited to the illegality or paragraph 6 (R: 336) of the Supplemental Agreement (R: 332-337), augmenting the original Agreement, that the original Agreement (R: 307-332) dated July 16, 1957, always had in effect at all times material since September 1, 1957, (R: 331) a "*most favored nation clause*", Article XXXIII (R: 330) which provided, in words and phrases, the following:

> **ARTICLE XXXIII: CONTRACTS WITH OTHER EMPLOYERS**
>
> **"In order to carry out the spirit of this agreement, the Union agrees that no more favorable terms or conditions than are provided for herein will hereafter be granted by the Union to any employers not members of the Association. The Union will exhibit to the Association, upon its written request the Union's contracts with such other employers."**

and the Union's regional director, Kehrer, during the trial of this cause, stated that this *Local (Union) would not sign up others except on the terms insisted upon by the Association pursuant to the most favorad nation provision.* (R: 277; P: 17*) Moreover, this same Kehrer stated, that it was one of the Association's contentions that the only reason they/it executed either this or the Supplemental Agreement was because of the Union's agreement to or-

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ganize (R:275). He even admitted that **organization** was a two-day bargaining session discussion in the negotiating of the Supplemental Agreement in connection with the enforcement of Article XXXIII, supra.

With regard to the above, the Union disregards or fails to call attention to the cases of **United Mine Workers of America, Petitioner,** versus **James M. Pennington, et al.** (1965), 85 S. Ct. 1585, and **Local Union No. 189, Amalgamated Meat Cutters, etc.** versus **Jewel Tea Company** (1965) 85 S. Ct. 1596. In the **Pennington** case the basic issue was whether the union could enter into a collective bargaining agreement with a multi-party bargaining unit regarding wages and, as a part of that agreement, undertake to impose the same standards on other small producers without regard to their ability to pay (the instant case). Mr. Justice White stated that the anti-trust laws applied to a conspiracy of employers and the union to eliminate competition based on sub-standard wages; the concurring opinion of Mr. Justice Douglas went even beyond the Mr. Justice White opinion. In Mr. Justice White's opinion he reasoned that a group of employers could not conspire to eliminate competitors, and the union was liable if it joined the conspiracy even though the union's part was to impose uniform wages on all the industry, and this opinion extends even the **Allen Bradley** decision.[1] In the case at bar the facts reveal that the Union and the Association mutually joined together in a conspiracy far exceeding the requirements of either the **Pennington, Allen Bradley** or the **Jewel Tea Company** cases(s), supra. The net result seems to be that an industry-wide agreement by union and employers setting

[1]Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, (1945) 325 U. S. 797, 65 S. Ct. 1533.

up a wage structure beyond the financial ability of marginal employers to pay and made to force marginal employers out of business is in itself a **prima facie** violation of the anti-trust laws. (In this connection see also P: 17, and the petitioner's briefs and the Petition for Rehearing filed in the appeal before the Court of Appeals for the Fifth Circuit.)

It would seem from the **Jewel Tea Company** case (and, of course, the **Pennington** case), that any discussions, even at the bargaining table, about the competitive impact of wages on other employers in the industry is itself evidence of a conspiracy subjecting companies i.e. Association and Unions alike, to treble damages in criminal and civil sanctions (in this connection see the record pages 262-278).

As for the exemption granted this Union by Section 8(e) of the National Labor Relations Act, which said Section was added in 1959 and can hardly be said to be sweat shop if only in view of the existence of the Fair Labor Standards Act, it is but necessary to point out that two of the Union's citations[2] in support of its position are based solely upon the case of **Employing Lithographers of Greater Miami** versus **National Labor Relations Board, 301 F. 2d. 20 (C. A. 5, 1962)** which petitioner has discussed, at great length, in the Petition for Writ (P: 21-22); not only was a ruling on the constitutionality of this exemption or, more specifically a determination of the illegality of proviso/exemption granted the garment workers in 8(e), unnecessary to a determination of

[2]NLRB v. Amalgamated Lithographers of America, 309 F. 2d 31 (C. A. 9, 1962) cert. den. 372 U. S. 943 (1963); Truck Drivers Local No. 413 v. NLRB, 334 F. 2d 539 (C. A. D. C. 1964).

the issues involved in these three cases (as the Court obviously recognized in the **Employing Lithographers** cases, supra, by the use of its words "in the meantime") but most importantly the Court was no confronted, as in this case, *with a head-on collision where am "employer" directly is denied guaranteed constitutional rights* **in a confiscatory manner in violation of due process.** Moreover in the light of the **Pennington** and **Jewel Tea** cases, supra, to hold that this exemptive proviso does not clash head on with the anti-trust laws would do violence to **reason.**

SUPPLEMENTAL CONCLUSION

The petitioner concludes, as it did in the first instance (P: 24) and requests oral argument.

Respectfully submitted,

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